1401 H Street, N.W.
Suite 1020
Washington, D.C. 20005
Office 202/326-3817

Ameritech

Gary L. Phillips
Director of Legal Affairs
Washington Office

November 20, 1998

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Street Lobby – TW A325
Washington, D.C. 20554

Re: Ex Parte Presentation
CCB/CPD 97-30 and
CC Docket 96-98

Dear Ms. Salas:

On November 4, 1998, Ameritech submitted an *ex parte* letter in this proceeding responding to a proposal by Time Warner Telecom (TWTC) that the Commission interpret simultaneously hundreds of Section 252 interconnection agreements that are not before the Commission and most of which the Commission has never seen. Ameritech noted that for the Commission even to opine in a non-binding fashion as to the possible meaning of hundreds of contracts that are not before it would be the ultimate in arbitrary and capricious agency action.

Ameritech is now under the impression that the Commission may be considering a slightly different – but no less arbitrary and capricious – proposal. Specifically, it appears that the Commission is considering an order in which it would: (i) suggest that it was reasonable for incumbent local exchange carriers (ILECs) to agree in Section 252 interconnection agreements to pay reciprocal compensation for Internet traffic; and (ii) address and possibly even validate the results of state arbitration decisions that required ILECs to pay reciprocal compensation for ISP traffic. Ameritech understands, further, that the Commission may be considering allowing states to impose reciprocal compensation obligations for ISP traffic in arbitrations on a going-forward basis, at least until alternative FCC rules are adopted. The Commission must reject these proposals.

First, the Commission has no authority to address negotiated interconnection agreements, and gratuitous comments designed to "bolster" prior state interpretations of those agreements would be inappropriate, particularly since the Commission has not even seen most of the contracts at issue.

Second, the Commission cannot lawfully endorse or ratify the results of state arbitrations imposing reciprocal compensation obligations. For one thing, the Commission lacks authority to review state arbitration decisions. Moreover, any suggestion that these decisions were correct would, as a substantive matter, be wrong.

In arbitrating contract disputes, the states are limited by law to implementing sections 251 and 252 and FCC rules promulgated under section 251. Section 252(c) so provides. The states have no authority to regulate interstate commerce beyond those bounds.

The Commission's own decisions make it eminently clear that section 251(b)(5) does not require payment of reciprocal compensation for ISP traffic. Moreover, the FCC's rules provide that the reciprocal compensation provisions of section 251 do not apply to interstate traffic. That being the case, the states had no authority to require the payment of reciprocal compensation for ISP traffic.[1]

Indeed, these decisions were not only unauthorized, they were inconsistent with the law. Section 251(g) makes clear that, until the Commission specifically rules otherwise, access traffic shall remain subject to the compensation regime in place at the time of enactment of the Telecommunications Act of 1996. For ISP traffic, that regime is the access charge exemption, and the states violated section 251(g) when they established a new reciprocal compensation regime for this access traffic.

Moreover, the Local Competition Order specifically provides that the reciprocal compensation provisions of section 251(b)(5) do not apply to interstate

---

[1] In imposing reciprocal compensation obligations on ISP traffic, states misapplied section 251(b)(5) of the Communications Act and the FCC's rules. Many mistakenly concluded that ISP traffic terminates at the ISP switch. Others ignored the language of section 251(b)(5) which requires a "termination" of telecommunications for reciprocal compensation obligations to apply and held that the access charge exemption effectively transformed access traffic into local traffic. The Commission has properly recognized that these premises were incorrect, and it did so by citing fifty years of unquestioned legal precedent. There is simply no way that the Commission can validate the results of these decisions: the states did not have authority to make them. That is the law.

traffic or to access traffic. States that took it upon themselves to require the payment of reciprocal compensation for ISP traffic violated these rules, as well.

Because the states had – and still have – no authority to impose reciprocal compensation obligations for ISP traffic in arbitrations, the Commission cannot authorize them to do so on a going-forward basis pending adoption of new rules. Nor can the Commission end-run around section 252(c) by delegating its general authority over interstate traffic to the states. The Commission's existing rules do not require the payment of reciprocal compensation for ISP traffic. Thus, the only basis upon which the Commission could impose such a requirement on a going-forward basis would be if it did so in accordance with Administrative Procedure Act (APA) procedures pursuant to its general authority to regulate interstate traffic. The Commission cannot avoid these requirements by purporting to delegate its powers to regulate interstate traffic to state arbitrators. That would be a patent violation of the APA and due process.

These matters are discussed in more detail in the attachment to this letter.

Sincerely,

Gary L. Phillips

Attachment

ATTACHMENT

I. NEGOTIATED AGREEMENTS

A. Suggestions that it Would Have Been Reasonable for ILECs to Agree in Their Interconnection Agreements to Pay Reciprocal Compensation for ISP Traffic Would be Gratuitous and Improper.

- The Commission does not have jurisdiction to interpret and enforce negotiated interconnection agreements. That is the prerogative of the states and federal courts, and it would be improper for the Commission to comment gratuitously on how those bodies should perform their functions.

- Indeed, in most states, these matters may not even be considered unless the contract is ambiguous.[1]

B. Such Suggestions Would Also Be, Not only Meaningless, But Wrong.

- The issue in any matter of contract interpretation is what did the parties agree to do, not what would have reasonable for them to agree to, had they reached an agreement.

    - In Ameritech's case, ISP traffic was not specifically discussed in any of the negotiations leading to Ameritech's existing interconnection agreements. There was no meeting of the minds with respect to this issue. What would have been reasonable is thus beside the point.

- In a contract that does not specifically address ISP traffic, it would be unreasonable to assume that the parties had <u>any</u> intention with respect to this traffic, other than to follow the law and the general provisions of the contract.

In fact, if a CLEC intended to seek reciprocal compensation for ISP traffic, it would have been unreasonable for a CLEC not to take pains to spell out its intent

---

[1] The fact that a contract does not expressly address ISP traffic does not mean that it is ambiguous. For example, a contract that provides for the payment of reciprocal compensation for traffic that originates and "terminates" in a local calling area is not ambiguous. Of course, Ameritech is not asking the Commission to decide these issues. Its point is simply that any assumption that issues of intent or what might have been reasonable are relevant is not necessarily warranted. And since the contracts at issue are not even before the FCC, such assumption is sheer speculation.

unambiguously in its interconnection agreements, particularly given that the FCC rules in place at the time made it clear that section 251(b)(5) does not apply to interstate traffic or to access traffic. (*See infra*)

- In negotiating contracts, ILECs and CLECs generally used sections 251 and 252 of the Act and the Commission's Local Competition Order as a blueprint. They attempted to fashion contracts that reflected their respective legal obligations and rights. ILECs were not required by law to pay reciprocal compensation for ISP traffic; thus, absent evidence to the contrary, it should be presumed that they did not intend to do so.

  - The Statute: Section 251(b)(5) requires the payment of reciprocal compensation only for the transport and termination of telecommunications, and as the FCC has found, ISP traffic does not terminate at the ISP switch.

  - Operative FCC Rules at the Time: "[T]he reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic. ... We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area[.]"¶1034 Local Competition Order. *See also* 47 CFR § 51.701 *et. seq.*

    While portions of the Local Competition Order were vacated in July 1997, paragraph 1034 was not vacated. Moreover, the vast majority of interconnection agreements were negotiated or arbitrated before July 1997. The FCC's reciprocal compensation rules and policies were in full force and effect at the time, and they – along with the other provisions of the Local Competition Order served as the blueprint for the parties' negotiations.

- From a business standpoint, it would have made no sense for an ILEC to agree to pay reciprocal compensation for ISP traffic had the issue actually been considered.

  - ISP traffic is inherently one-way, not reciprocal. The only scenario in which an ILEC could receive reciprocal compensation for ISP traffic would be if a CLEC provided facilities-based service to an end user sending Internet traffic to an ISP served by the ILEC. But since ILECs serve the overwhelming majority of end users, this situation would almost never occur. Agreeing to pay reciprocal compensation for ISP traffic thus would have been patently unreasonable.

C. The FCC Has Never Held that ISP Traffic Should be Treated as Local Traffic, and, Even if it Had, any Such Holding Would Have No Bearing On Whether ISP Traffic Terminates at the ISP Switch.

- The Commission has never held that ISP traffic should be treated as local traffic. The Commission held that ISPs should be treated as end users for access charge purposes. This was a pricing decision, and it was based solely on the FCC's stated concern to protect a fledgling industry from rate shock.

    - Nor has the FCC delegated authority to regulate ISP traffic to the states. The only authority exercised by the states was their pre-existing authority to establish rates for local business lines used by ISPs for access traffic.

    - The FCC's Access Reform Order shows that the FCC did not contemplate the application of reciprocal compensation to ISP traffic. The FCC stated that ILECs had not shown that : "the non-assessment of access charges results in ISPs imposing uncompensated costs on incumbent LECs." ¶346. If the FCC contemplated at the time that ISP traffic was to be "treated" as local traffic subject to reciprocal compensation obligations, it would have addressed the economic implications of such treatment.

- In any event, claims that this traffic was treated as local are irrelevant since the statutory and regulatory rules were quite specific as to what traffic falls within section 251(b)(5) and the FCC's rules. The statute and FCC rules impose reciprocal compensation obligations, not on "local traffic" or "traffic treated as local" but on traffic that one LEC originates and the other "terminates." The FCC has recognized that ISP traffic does not "terminate" at the ISP switch. How it was "treated" for access charge purposes is irrelevant.

D. If The Commission Insists on Gratuitous Language, It Should Be Balanced and Fair.

- If the Commission insists on offering gratuitous statements about the presumed intent of the parties or the reasonableness of certain hypothetical actions, it should do so in a balanced and fair way, noting the arguments for both sides. It would patently unfair to offer speculation in one direction and not the other. The Commission might, for example, note that it might reasonably be assumed that parties did not specifically contemplate ISP traffic if they did not expressly address it in their agreements.

II. STATE ARBITRATION DECISIONS

A. The Commission Does Not Have Authority to Review State Arbitration Decisions.

- Any gratuitous comment, much less a conclusion, by the Commission as to the reasonableness of state arbitration decisions would be improper, since the Commission has no authority to review such decisions. §252(e)(6)

- Particularly since many, if not most, of these decisions were based on grounds repudiated by the *GTE ADSL Order* – namely that ISP traffic terminates at the ISP switch and/or that the access charge exemption transformed access traffic into local traffic – the Commission could not possibly suggest blanket approval of these decisions.

B. The Commission Could Not Possibly "Validate" These Decisions, Even if it Had Authority to Review Them.

(1) States Have No Authority to Impose Reciprocal Compensation on ISP Traffic.

- The authority of the states to arbitrate contract disputes derives from section 252. Section 252(c) addresses the scope of the states' authority to resolve disputes and impose conditions. Section 252(c)(1) provides that in resolving open issues and imposing conditions upon the parties, the state shall "ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251." (*See also § 252(e)(2)(B)*) Section 252(c)(2) also permits states to arbitrate disputes relevant to section 252(d) pricing issues. States do not have authority to impose requirements in arbitrations that are not grounded in section 251, including FCC rules promulgated thereunder, or section 252.

    - This makes sense. Under the statutory regime, parties have the right to deviate from the requirements of section 251 if they so agree. §252(a). To the extent, they cannot agree with respect to a matter, however, the states' job is to ensure that the requirements of section 251 and the related pricing provisions in section 252 are met.

    - Consistent with the statute, the Local Competition Order describes the states' arbitration powers solely with reference to the

substantive requirements of sections 251 and 252. *See* ¶¶ 84, 133-137.

- 251(b)(5) does not require the payment of reciprocal compensation for ISP traffic.[2] Therefore, states did not – and do not – have authority to require the payment of reciprocal compensation for ISP traffic.

  - Section 251(b)(5) requires LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications." The Commission quite properly concluded in the *GTE ADSL Order* that DSL service does not terminate at the ISP's local server. ¶19 This holding was based on 50 years of precedent holding that the boundaries of a communication are determined on an end-to-end basis. For the same reasons that telecommunications transmitted to an ISP via DSL service does not terminate at the ISP switch, neither does telecommunications transmitted via a dial-up connection. Because ISP traffic does not terminate at the ISP switch, section 251(b)(5) does not impose reciprocal compensation obligations for that traffic.

(2) Not Only Did States Lack Authority to Require Payment of Reciprocal Compensation for ISP Traffic, They Violated Federal Law When They Did So.

- The fact that states lacked authority to require payment of reciprocal compensation for ISP traffic puts to rest any suggestion that they were reasonable when they did so. In fact, though, their decisions were not merely unauthorized; they were inconsistent with federal law.

  - *State decisions were inconsistent with Section 251(g)*, which provides, *inter alia*, that FCC rules governing LEC provision of access services, including its pricing rules for such services, remain in effect until expressly superseded by the FCC. As the Commission recognized in the Local Competition Order, "[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic."¶1033.

---

[2] Nor, of course, does any other provision of § 251. For example, the Commission has concluded "that the term 'interconnection' under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic." *Local Competition Order* ¶ *176*. The Commission expressly rejected arguments that it should include "the transport and termination of traffic within the meaning of section 251(c)(2). *Id.*

- Because section 251(g) codified the FCC's policies with respect to access traffic until superseded by the FCC, the states violated section 251(g) when they imposed reciprocal compensation obligations on access traffic.

  - The *GTE ADSL Order* recognizes that a connection to an ISP is access traffic. This conclusion is consistent with a long line of decisions in which the Commission expressly characterized it as such. Indeed, as the Commission notes, "that the Commission exempted ESPs from access charges indicates its understanding that they in fact use interstate access service." *GTE ADSL Order* at ¶ 21.

- *State Decisions Also Were Inconsistent With the FCC's Rules at the Time.* In the *Local Competition Order*, the Commission held that reciprocal compensation obligations apply only to traffic that originates and terminates within a local calling area, not to interstate traffic. It could not have been more clear. In a section entitled "Distinction between 'Transport and Termination' and Access," the FCC stated:

  > *"We find that the reciprocal compensation provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic."* ¶1034
  >
  > The Commission also stated: *"We conclude that section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area[.]" Id.*

  - These conclusions were not vacated by the *Iowa Utilities Board* decision. While that decision vacated other paragraphs of the Local Competition Order, it did not vacate ¶1034. Moreover, even if the court could be deemed implicitly to have vacated portions of that paragragph, it certainly could not have vacated the FCC's conclusion that reciprocal compensation does not apply to interstate traffic.[3]

---

[3] In vacating some of the FCC's local competition rules, the court held that section 251 of the Act did not supplant section 2(b) and that, accordingly, the FCC lacked authority to regulate intrastate traffic except as specifically conferred by section 2(b).. The court did not rule that the FCC could not address the application of section 251 to interstate traffic, as some have suggested. Indeed, if that were the case, states would be free to superimpose reciprocal compensation obligations, not only on ISP traffic, but on other types of interstate traffic, including access traffic that is currently subject to the Part 69 regime. Indeed, states could require the payment of

- In any event, the vast majority of interconnection agreements were executed or arbitrated before the *Iowa Utilities Board* decision. At the time of these agreements and arbitrations, therefore, ¶1034 was the law of the land, and – as with the rest of the Local Competition Order - was the blueprint in the negotiation of interconnection agreements and the arbitration process.

- The fact of the matter is that the states misapplied these rules. They wrongly concluded that ISP traffic "terminates" at the ISP switch and that it is local, not interstate traffic. These decisions cannot be "sanitized" and "validated" after the fact through made-up rationalizations that the states did not themselves offer. They certainly cannot be validated by the FCC – which does not even have authority to review state arbitrations.

(3) There Was no Policy Vacuum For States to Fill.

- The premise that there was a policy "gap" which the states had a right to fill is flawed. It would also be reckless for the FCC to so hold if the FCC improperly finds that the states may impose in arbitration decisions conditions that transcend the requirements of sections 251 and 252.

  - FCC rules do address intercarrier compensation for ISP traffic. The rule – embodied in the access charge exemption – was (and is) that each LEC must look to its own customer for compensation – the ILEC to the originating end user, the CLEC to the ISP. That rule may or may not constitute good public policy; it is incorrect, however, to suggest that it is no policy at all.[4]

  - The notion that states may impose requirements in arbitrations that transcend the requirements of sections 251 and 252, or FCC rules thereunder, whenever the FCC has not expressly addressed a

---

reciprocal compensation when two IXCs interconnected their facilities to complete a long distance call. Obviously, the states have no such authority..

[4] As explained in Ameritech's November 4 *ex parte*, a copy of which is attached hereto, ILECs and CLECs actually generate about the same amount in revenues for each end user whose traffic they jointly deliver to an ISP. (The ILEC recovers revenues from the originating end user; the CLEC from its ISP customer, which must purchase sufficient services from the CLEC to accommodate all of the ISP's traffic)..

particular situation is dangerous and untenable. That is because the lack of a rule may in itself constitute a policy. Or a general rule that does not include exceptions for specific situations may reflect a deliberate policy. To suggest that the failure to address a specific factual context constitutes a "vacuum" or a "void" that the states may fill is to invite states to recreate federal policy with respect to interstate communications in violation of the principles of federalism embodied in the Commerce Clause of the United States Constitution and the Communications Act.

- Without limiting the states' arbitration authority (as the statute requires) to the enforcement of sections 251 and 252, this ruling could place the Commission in perpetual conflict with the states. How ironic it would be if gratuitous language, such as that proposed – which has no business in an FCC order, but which has been suggested to placate the states – became a source of future conflicts between the jurisdictions.